JUL 17 1961
JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1961.

No. 232.

GEORGE MARKOS,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of the State of Ohio.

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In the Supreme Court of the United States

OCTOBER TERM, 1961.

No._____.

GEORGE MARKOS,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI To the Supreme Court of the State of Ohio.

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Ohio, entered in the above entitled case on April 19, 1961.

OPINIONS BELOW.

The opinion and journal entry of the Court of Appeals for the Fifth District, Tuscarawas County, Ohio, are contained in the appendix hereto at pages 15 to 25. The entry of the Supreme Court of Ohio (*infra*, page 26) is reported at 172 O. S. 134.

JURISDICTION.

The judgment of the Supreme Court of Ohio was announced on March 29, 1961 (*infra*, p. 26). An application for rehearing was denied on April 19, 1961 (*infra*, p. 26). The jurisdiction of this Court is invoked under the provisions of 28 U. S. C. § 1257(3).

The Constitution of the State of Ohio provides, in part, in Article IV, Section 2: It (the Supreme Court)

shall have "appellate jurisdiction in all cases involving questions arising under the Constitution of the United States or of this state, in cases of felony on leave first obtained." Article IV, Section 6 provides that the Court of Appeals have "such jurisdiction as may be provided by law to review, affirm, modify, set aside, or reverse judgments or final orders of boards, commissions, officers, or tribunals, and of courts of record inferior to the court of appeals within the district, and judgments of the courts of appeals shall be final in all cases, except cases involving questions arising under the Constitution of the United States or of this state, cases of felony. * * *"

The Legislature of Ohio implemented this constitutional provision by Ohio Revised Code Section 2953.02, which provides in a criminal case for review of judgment or final order of a court of record inferior to the court of appeals, in the Court of Appeals. A judgment or final order of the Court of Appeals in the conviction of a felony may be reviewed by the Supreme Court.

Ohio Revised Code Sections 2503.36 and 2505.45 give the Supreme Court of Ohio rule-making authority. Under Rule XX of the Rules of the Supreme Court of Ohio, it is provided that an application for rehearing of any cause or motion shall be made within fourteen days after the announcement of the decision of the Supreme Court, provided the Clerk of that Court was notified within seven days that the application would be filed. The final judgment of the Supreme Court of Ohio, after an appeal from the Court of Common Pleas to the Court of Appeals, then to Supreme Court, leaves the petitioner with no further appellate remedy under the constitution or laws of the State of Ohio. The entry on the application for rehearing was filed on April 19, 1961.

QUESTIONS PRESENTED.

1. Whether, at a bribery trial, a statement made to the prosecuting attorney by the official bribed, eight months after the last date of the scheme or conspiracy, is competent evidence when not made in the furtherance of the scheme or conspiracy, and deprives the petitioner of the right of confronting the witness against him, violates the Due Process Clause of the Fourteenth Amendment and the Sixth Amendment of the Constitution of the United States.

2. Whether, after a scheme or conspiracy to give bribes ended, and months later steps were taken by the alleged bribe givers and bribe taker to quiet one of the schemers or conspirators who threatened to expose them unless paid off, is competent evidence in a conspiracy to bribe trial when all acts done were to cover up what had been done in the past, violates the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

3. Whether a taped conversation from a tape recorder used to refresh a witness' recollection, wherein the entire taped conversation was run before the jury but certain parts excluded and the jury instructed not to consider the excluded portions, but where the entire tape conversation recording was sent to the jury room, violates the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

4. Whether the sentence imposed and probation qualifications violate the Fourteenth and Eighth Amendments of the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED.

Constitution of the United States.

FOURTEENTH AMENDMENT:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

SIXTH AMENDMENT:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense."

EIGHTH AMENDMENT:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

STATEMENT OF CASE.

I. PROCEDURE.

The petitioner was indicted individually for violation of Revised Code Section 2917.01 of the State of Ohio denoted "Bribery," which section reads as follows:

> "No person shall corruptly give, promise, or offer to a member or officer of the general assembly or to a state, judicial, or other officer, public trustee, or an agent or employee of the state or of such officer or trustee, either before or after his election, qualification, appointment, or employment, any valuable thing, or corruptly offer or promise to do any act beneficial to such person to influence him with respect to his official duty, or to influence his action, vote, opinion, or judgment, in a matter pending, or that might legally come before him. No member of the general assembly, or a state officer or other officer, public trustee, agent, or employee of the state or of such officer or trustee, either before or after his election, qualification, appointment or employment, shall solicit or accept any valuable or beneficial thing to influence him with respect to his official duty, or to influence his action, vote, opinion, or judgment, in a matter pending, or that might legally come before him.
>
> "Whoever violates this section shall be imprisoned not less than one nor more than ten years.
>
> "A person convicted under this section is disqualified from holding any public office or appointment under this state, and, if not a state officer, shall be removed from office or employment by order of the court."

The indictment returned by the January, 1960 term of the Grand Jury on January 28, 1960 (*infra*, p. 26), in seven counts charged this petitioner individually with offering bribes to one Clifford Froehlich, Mayor of Dover, Ohio, on seven separate occasions, the last of which was

May 19, 1959, to influence the Mayor with respect to his official duty, the suppression of gambling. A bill of particulars set forth that this petitioner "did plan, scheme, and arrange in the nature of a conspiracy with the following named persons, to-wit: Fred G. Bergquist, Joseph Adelstein, Paul J. Knisely, Frank Duda and Nickolas Nigro of Dover, Ohio, and other persons unknown to the State of Ohio at this time, that whereby the said George Markos and Frank Duda did solicit, collect and accept money from the above named persons, and did arrange for payments of at least part of said monies to be paid by the Defendant or his agent, Frank Duda, to Clifford C. Froelich, the duly qualified, elected, and acting Mayor of the City of Dover, Tuscarawas County, State of Ohio. Said payments were made to said Mayor on the dates indicated in each count of the indictment, and were made for the purpose to influence said Mayor Froelich with respect to his official duty as Mayor of said City, to-wit: The non-enforcement of ordinances and laws relating to gambling activities of said above named persons in said City of Dover, and to influence his action, opinion or judgment in matters that might legally come before him, which matters may have involved said above named persons. The amount of money payments in each count of the indictment cannot be stated definitely at this time, but the State does believe that said money payments were above as indicated below. First Count: Amount Unknown. That count has been eliminated. Second Count: $300.00. Third Count: $150.00. Fourth Count: $300.00. Fifth Count: $300.00. Sixth Count: $150.00. Seventh Count: $300.00. As to the place where the payment of money was made to Mayor Froelich, the State does not know with complete definiteness as to the exact location, but it believes that it was in or about the City of Dover, in the County of Tuscarawas."

Trial was had before a jury in Common Pleas Court of Tuscarawas County, Ohio, from June 6 to June 16, 1960. During the trial, the first count of the indictment was dismissed. Petitioner was convicted on counts two through seven, and sentenced on count two to the Ohio State Penitentiary for not less than one or more than ten years, and on count three to the Ohio State Penitentiary one to ten to run consecutive to count one.

On count four, imposition of sentence was suspended and defendant placed on probation for a period of five years upon the following terms and conditions:

> 1. Within ten days from June 28th, 1960 Defendant shall sell all legal coin operated machines now owned, or in which the Defendant has any interest whatsoever.
>
> 2. That within five days from June 28th, 1960 all illegal coin operated machines, all tickets, punch boards or other gambling devices or equipment, now owned by the Defendant or in which the Defendant has any interest whatsoever, shall be delivered to the Prosecuting Attorney of this county with orders to the Sheriff of Tuscarawas County to destroy the same. If there be any undetermined question relative to the legality or illegality of any such machines, they shall be delivered to the Prosecuting Attorney until such question is settled by a court of competent jurisdiction.

On count five, imposition of sentence was suspended and defendant placed on probation for a period of five years upon the following terms and conditions:

> 1. That within ten days from June 28th, 1960 the Defendant pay to the State of Ohio the sum of $3,000.-00 as partial reimbursement for expenses incurred by the State of Ohio in the investigation and prosecution of this cause.

On count six, the court again placed the defendant on probation for a period of five years upon the following terms and conditions:

> 1. That the Defendant within ten days from June 28th, 1960 pay to Tuscarawas County in Ohio, all expenses incurred by the county in connection with the investigation and prosecution of this case, including therewith all fees for jurors called in connection with the trial of this case, in the sum of $1660.35, and that the Defendant pay in full within said period, the court costs in this cause, taxed at $____.

And on count seven, imposition of sentence was suspended and defendant placed on probation for a period of five years upon the following terms and conditions:

> 1. That the Defendant immediately dispose of all personal property in his storehouse, warehouse and office located in the building from which his operations have been carried on according to the terms and conditions of this sentence, and not again permit said premises to be used or occupied for any illegal purposes.
>
> 2. That the Defendant immediately disassociate himself with any and all interest, either personal, or by partnership, agency, corporation or family, or any other method of participation or association whatever, with all gambling property or activity, and that he not again engage in any such operation, or in any gambling operation of any kind or description in any manner whatsoever.

This judgment of conviction was affirmed by the Court of Appeals for the Fifth District on December 20, 1960. The appeal to the Supreme Court was dismissed on March 29, 1961, and a petition for rehearing was denied on April 19, 1961. Petitioner has no further remedy for appellate review in the state courts of Ohio.

II. MATERIAL FACTS.

(A) Evidence of Scheme.

Nicholas Nigro, not indicted, testified that he opened a gambling establishment in Dover, Ohio, in August, 1957 (R. 184). Early in November, 1957, a scheme was entered into with himself, this petitioner, Frank Duda, Fred Bergquist, Joe Adelstein, Paul Knisely, Charles Greco and Sam Tornabene, gambling operators, (R. 181), to pay monthly into a fund for Mayor Clifford Froelich for protection, so that their gambling activities could operate unmolested. Payments to the fund were made by Nicholas Nigro until he went out of business the latter part of June, 1959 (R. 207). Certified copies of Forms 11-C, Registry for Wagering, and Forms 730, Tax on Wagering, were put in evidence as to Joseph Adelstein, Fred Bergquist and Paul Knisely (R. 37, 55). Pinball machines and other gambling devices obtained from the Dover Novelty Co., owned by petitioner, on a search warrant issued February 10, 1960, were placed in evidence. (R. 107-172.)

(B) Evidence of Cover Up After End of Scheme.

In August, 1959, (two months after Nicholas Nigro went out of business) Nigro testified that he went to Mayor Froelich's home (R. 211), told the Mayor he had been paying money, and that they had run him out of business (R. 213); that Nigro had been paying $75.00 a month for about two years, and wanted to know who set the price (R. 214); that the money ought to be returned (R. 218). Nigro further testified that the Mayor called him a blackmailer (R. 218); that later on the Mayor paid Nigro $500.00 (R. 222) and promised to pay the remainder within 30 days (R. 224); that the Mayor said Bergquist, Knisely and Adelstein would each pay $600.00 (R. 229). Nigro testified that at a

meeting with Knisely, Knisely said they would pay to keep peace (R. 229). Mayor told Nigro that he would send Mike Carmola to pay off Nigro (R. 234). On November 21, 1959, Carmola told Nigro they would pay $3,500.00. Nigro said that he only wanted what he paid—about $1,800.00 (R. 236, 237). Another meeting between Carmola and Nigro was held January 6, 1960 (R. 240) and another on January 13, 1960.

Mike Carmola testified that he had several meetings with Nigro at Nigro's request (R. 278). Carmola could not recall all of the conversation of meeting with Nigro on January 13, 1960 (R. 280). Prosecutor Patrick asked the court's permission to play a tape recording to refresh Carmola's recollection (R. 281). Tape recorder had secretly been placed in Nigro's home on January 13, 1960 (R. 283). The court permitted the playing of the tape recording (R. 292). The entire tape recording went to the jury room (R. 420).

(C) Extra Judicial Statement.

Assistant County Proescutor Harlan Spies testified that Mayor Froelich came to the prosecutor's office on January 26, 1960 (R. 344); that he asked Mayor Froelich if he desired counsel; that Mayor Froelich admitted being at the meeting at Carmola's on January 6, 1960 to settle with Nigro (R. 346); that Mayor Froelich admitted he received $1,500.00 from this petitioner at Dover, Ohio (Tuscarawas County) (R. 347); that Mayor Froelich gave him a sheet of paper (Exhibit 141) (R. 348), showing receipts from the petitioner in the amount of $300.00 on June 27, 1958, $150.00 on October 6, 1958, $300.00 on December 8, 1958, $300.00 on March 24, 1959, $150.00 on April 18, 1959 and $300.00 on May 19, 1959, for a total of $1,500.00 (R. 355).

III. FEDERAL QUESTION RAISED BELOW.

(A) In Trial Court.

When the petitioner objected to the testimony of the assistant prosecuting attorney relating to the statement made by Mayor Froelich given at the prosecuting attorney's office eight months after the end of the scheme or conspiracy to bribe, the court excused the jury and told the court reporter to leave (R. 345). After conference the trial proceeded. The court permitted the assistant prosecutor to testify as to venue and introduce into evidence a paper setting out the dates of payments which was the only evidence in the case of dates and payments (R. 346, 355). Mayor Froelich was under subpoena by the prosecution (R. 360, 361), but not used. The court said if the petitioner desired to question the Mayor, the petitioner could call him (R. 357).

Petitioner's objection to the evidence of covering up after the end of the scheme or conspiracy was summarily ignored by the court, even though petitioner's counsel said he would "like to be heard on it, if the court please, at this junction" (R. 212).

Petitioner objected to playing of tape recording to refresh a witness' recollection (R. 289) of conversations, after the end of the scheme or conspiracy, regarding covering up, and objected to its admissibility (R. 291). Certain parts of the tape recording were ordered by the Court not to be considered by the jury (R. 300), and (R. 309) the entire tape recording was sent to the jury room for playing to the jury (R. 420).

(B) In the Court of Appeals, Tuscarawas County, Ohio and in the Supreme Court of Ohio.

In the Court of Appeals and Supreme Court of Ohio, Assignments of Error raised the constitutional questions which are a part of the certified record of the Court below, which is filed herewith.

ARGUMENT.

Certiorari should be granted in this case because of failure to accord the petitioner his fundamental rights to a fair hearing in violation of the Fourteenth Amendment of the Constitution of the United States.

Conspiracy, in and of itself, is not a crime in the State of Ohio. One or more may be conspirators to commit the crime of bribery. 10 *O. Jur.* 2d 68. The law in Ohio, as in federal cases, is that everything said, written or done while the conspiracy is in progress and in the furtherance of the common purpose is admissible. 10 *O. Jur.* 2d 75.

The Due Process Clause of the Fourteenth Amendment of the United States Constitution requires that the State of Ohio afford the petitioner in this case a fair trial. The right to liberty and property was denied the petitioner by the introduction into evidence in this case of an extrajudicial statement made to an assistant prosecutor by the alleged receiver of the bribe, eight months after the end of the conspiracy. The only evidence of the venue of the crime of bribery and the only evidence of the dates and amounts of payments were notations given by the receiver of the bribes at the extrajudicial statement two days before the return of the indictment against this petitioner, all being hearsay and narrative of past occurrences.

The court, at the trial, dismissed count one of the indictment for the reason that the receiver of the bribes did not list on his notation (Exhibit 141) given to the assistant prosecutor a payment as alleged in count one (R. 364).

At the trial of this petitioner, the bribe taker was suppoenaed by the state, but he was not called by the state. Instead the state's assistant prosecutor testified for the alleged bribe taker as to the extrajudicial statement, depriving the petitioner of confronting the witness against him. The Supreme Court of the United States has re-

peatedly said that a state owes a duty to everyone to a fair trial. *Irving v. Dowd* (Indiana 1960) 6 L. Ed. 2d 751, ____ U. S. ____.

A fair hearing under the standards of *Gruenwald v. United States* (1957) 353 U. S. 391, 1 L. Ed. 2d 931, 77 S. Ct. 963, 62 A. L. R. 2d 1344, has not been met when after the conspiracy has ended testimony is introduced showing efforts of one of the former schemers to recover money he paid out during the conspiracy; all being extrajudicial statements made after the end of the conspiracy. *Krulewich v. United States* (1949), 336 U. S. 440, 69 S. Ct. 716, 93 L. Ed. 760.

The tape recording, surreptitiously taken without a state's witness's knowledge, was used to refresh the witnesses' recollection on direct examination on matters that occurred after the conspiracy ended. Certain portions of the tape recording were excluded by the trial court, but the entire tape went to the jury room. The Court of Appeals, in its opinion, stated:

> "Allowing the said tape recording to go to the jury room has given this Court major concern."

then stated such action was "at the discretion of the Court."

The Court of Appeals had reason to be deeply concerned, for the tape recording used to refresh the witnesses' recollection became primary evidence that went to the jury for consideration.

The Supreme Court of the United States has said that while the states have a right to fashion their own rules of evidence for criminal trials, they must respect certain decencies of civilized conduct. *Rochin v. California* (1952), 342 U. S. 165, 72 S. Ct. 205.

The petitioner, in addition to paying costs of prosecution, is required to pay Three Thousand Dollars ($3,000.-

00) partial reimbursement of investigative expenses by the state, sell his legal coin-operated machines, and not permit the premises, not owned by this petitioner (R. 112), to be used for an illegal purpose for five years, to qualify for probation. The terms of the probation deprive this petitioner of property without due process of law, and constitute cruel and unusual punishment. The Court of Appeals' opinion, page 20, recognized the onerous restraints upon the petitioner's liberty and property.

CONCLUSION.

Therefore, petitioner respectfully requests that a Writ of Certiorari issue to the Supreme Court of the State of Ohio.

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APPENDIX.

OPINION OF THE COURT OF APPEALS OF TUSCARAWAS COUNTY, OHIO.

(Decided Dec. 20, 1960.)

McLAUGHLIN, *J.*

This criminal appeal is from a bribery conviction and sentence. Defendant Markos was indicted in seven counts for giving money bribes to Mayor Froelich of Dover, the purpose being to permit a group of alleged gamblers to operate unmolested by local law enforcement officials.

The State filed a bill of particulars which stated that Markos "did plan, scheme and arrange in the nature of a conspiracy with the following named persons, to-wit: Fred G. Bergquist, Joseph Adelstein, Paul J. Knisely, Frank Duda and Nickolas Nigro of Dover, Ohio, and other persons unknown to the State of Ohio at this time, that whereby the said George Markos and Frank Duda did solicit, collect and accept money from the above named persons, and did arrange for payments of at least part of said monies to be paid by the Defendant or his agent, Frank Duda, to Clifford C. Froelich, the duly qualified, elected and acting Mayor of the City of Dover, Tuscarawas County, State of Ohio. Said payments were made to said Mayor on the dates indicated in each count of the Indictment, and were made for the purpose to influence said Mayor Froelich with respect to his official duty as Mayor of said City, to-wit: The non-enforcement of ordinances and laws relating to gambling activities of said above named persons in said City of Dover, and to influence his action, opinion or judgment in matters that might legally come before him, which matters may have involved said above named persons. The amount of money payments in each count of the Indictment cannot be stated definitely at this time,

but the State does believe that said money payments were above as indicated below. First Count: Amount Unknown. That count has been eliminated. Second Count: $300.00. Third Count: $150.00. Fourth Count: $300.00. Fifth Count: $300.00. Sixth Count: $150.00. Seventh Count: $300.00. As to the place where the payment of money was made to Mayor Froelich, the State does not know with complete definiteness as to the exact location, but it believes that it was in or about the City of Dover, in the County of Tuscarawas."

Similar indictments were returned against the other persons named in the bill of particulars, except Nickolas Nigro, who was granted immunity to be a witness for the State. Mayor Froelich was indicted for taking the bribes.

Nigro, a disgruntled gambler, apparently told his story, first to some newspaper men, then to the Governor, who referred the matter to the Attorney General's Office, then to two special investigators for the Attorney General, then to the local Prosecuting Attorney, then to the Grand Jury and finally in Court as a State's witness.

His story, in substance, was that he was a member of a group of gamblers, including Markos, who in the latter part of 1957, were engaged in large scale gambling activities in Dover; that this group entered into a scheme or plan, whereby each of the gamblers paid a certain sum of money each month into a pool controlled by Markos, who in turn gave it to Mayor Froelich for "protection" or for being allowed to operate their gambling activities unmolested by the law; that he (Nigro) was arrested three times, each time being an occasion when he had failed to make his $75.00 monthly assessment; that he became disgruntled and went to Mayor Froelich and demanded his money back; that afterwards the gamblers met in a series of clandestine meetings, their purpose being to buy Nigro's

silence concerning their gambling and bribery activities; that Nigro refused several offers of settlement; that on one occasion Mayor Froelich did return $500.00 to him.

Shortly after Nigro had "talked" to the authorities, a search warrant was obtained and Markos' warehouse was searched and a lot of gambling paraphernalia was seized. It consisted of punch boards, baseball tickets, football pool tickets, numbers slips, and bingo type pin ball machines.

Also, some astute, alert detective work on the part of Attorney General's investigators procured from the Internal Revenue Department the tax returns of certain gamblers in the group who had obtained Federal gambling stamps, which showed their yearly gambling income to run into hundreds of thousands of dollars.

Upon trial, the search and seizure of the gambling paraphernalia, certain of which was offered in evidence, was shown first. Then the tax returns of the Federal stamp holders were next offered. All this evidence was admitted tentatively by the trial Court, upon the Prosecutor's professional statement that it would be connected up later. Then the State offered Nigro, who testified generally as we have related. Then the State called as a witness one Mike Carmola, who professed to be friendly to both Nigro and the group who were attempting to buy his silence. Carmola testified as to being sent as an emissary to Nigro's house, to negotiate a settlement with him. Since this was after Nigro had "talked" to the authorities, a tape recorder had been planted in Nigro's house and the entire conversation between Nigro and Carmola was recorded thereon. Upon Carmola's statement that he did not recall this conversation in detail, the trial Court then allowed the tape recorder to be played back to him in the presence of the Jury. Later the tape recorder was offered and admitted in evidence over objection. It was allowed

to go to the Jury room, without specific objection thereto, as an exhibit. It should be stated that during the playing of the tape recorder, the trial Court stopped it a number of times, and struck from the Jury's consideration certain parts of the recording. As a final witness, the State offered the testimony of Spies, the Assistant Prosecutor, who related that he had had several conversations with Mayor Froelich, who had told him that Markos had at various times given him money for "city improvements" such as "new garbage cans," and that the Mayor had given him a list, which was offered and admitted in evidence, over objection, of times and amounts. The list showed that the Mayor had accepted from Markos, on at least six separate occasions, sums of money which totaled $1500.00.

The jury returned its verdict, finding Markos guilty as charged in the second, third, fourth, fifth and sixth counts of the indictment. The first count was dismissed by the trial Court.

Markos makes several assignments of error. They are herein treated in the same order as briefed.

I. Misconduct of juror during trial.

All that the record shows is that counsel made certain statements in argument upon a supplemental motion for new trial. It was claimed that there was an attempted bribery of a juror to favor the defense, and that the juror approached had not reported same to the Court, contrary to specific instructions, and that the alleged briber was later indicted.

We note that none of the facts of this juror's alleged misconduct appear affirmatively in the record of this trial. It would be a travesty on justice for this Court to say that the attempted bribery of a juror in favor of the defense prejudiced the jury or prevented the accused from having

a fair trial. See Section 2945.83 of the Revised Code, which holds in pertinent part:

> "* * * nor shall any judgment of conviction be reversed in any court * * * unless it appears affirmatively from the record that the accused was prejudiced thereby or was prevented from having a fair trial."

II. Misconduct of the Prosecuting Attorney.

The defense brief has the following statement of facts, none of which are shown affirmatively by the record. On the morning the trial was to commence, while the prospective jurors were entering the Courthouse, a truck-van load of the pinball machines was backed up to the south stairs of the Courthouse facing the plaza. The rear and side doors were open and it is claimed that it was absolutely impossible for a prospective juror entering the south door to avoid seeing the pinball machines. It is further claimed that the Prosecutor had also caused more pinball machines to be placed in the lobby or corridors outside the Courtroom.

However, the record is void of any evidence of these facts or even any comment by counsel, or as to any juror having observed the machines or was prejudiced thereby. The record does show that one of the machines was offered and admitted into evidence. Therefore we fail to see how any juror could have been prejudiced. Again we cite the above quoted words of Section 2945.83 R. C.

Misconduct of the Prosecutor is also claimed in that he released information contained in the gambling tax returns of the conspirators prior to them being submitted as evidence to the Jury. The record of trial shows that the gambling tax returns of Joseph Adelstein, Fred Bergquist and Paul Knisely were admitted in evidence. The record does not show that the Prosecutor released this informa-

tion to the newspapers. Even if we assume that he did, we cannot see how it could have prejudiced the accused since the tax returns were in evidence. The Prosecutor is not responsible for the conduct of vigorous and alert news reporters. We see no misconduct. See again Section 2945.83 R. C.

III. Error in the Sentence.

The trial Court after sentencing Markos to the Penitentiary on the second and third counts, suspended the imposition of sentence on the fourth, fifth, sixth and seventh counts and imposed rather harsh terms and conditions. These terms required Markos generally to dispose of all of his coin operated machines and to reimburse the State for expenses incurred in the investigation and prosecution of this case.

Section 2951.02 R. C. provides in pertinent part that the "Judge * * * may suspend the imposition of sentence and place the defendant on probation upon such terms as such Judge determines * * *."

Conditions of probation are discretionary with the trial Judge and their acceptance is optional with the defendant. Although the conditions imposed here extract pecuniary restitution to the State and do impose onerous restraints upon his liberty and property rights, we cannot say that the trial Court abused its discretion in the sentence of the accused George Markos.

IV. Irregularities in the proceedings of the Court; errors of law at trial; violation of defendant's legal and constitutional rights.

(A) Alibi. The trial Court rejected defendant's proffered evidence of alibi. No notice of intention to prove an alibi was given as required by statute. Defendant claims

that the indictment and bill of particulars lacked sufficient definiteness of dates when the bribe money was paid. Each of the last six counts of the indictment stated that the payments were made on or about certain definite dates. The defendant proffered evidence of his whereabouts elsewhere on the exact dates as set forth in two counts of the indictment and bill of particulars. This indicates that he entertained no uncertainty of those dates and completely dispels his excuse for not giving the State notice of intention to prove alibi.

(B) Error in the admission of evidence offered by the State over objection of the defendant. Obviously the trial Judge, in ruling upon the admission of certain items of evidence, was attempting to follow a line of Ohio authorities, especially the landmark case on conspiracy, *State vs. Nevius,* 147 Ohio State, 263. The Ohio rule is well stated in various paragraph sections of *Ohio Jurisprudence* 2nd; several of which we quote: 10 *Ohio Jurisprudence* 2nd, pages 75 and 76:

> "24. Generally. It is well established in Ohio that when the fact of a conspiracy has been established prima facie, everything said, written, or done by any one of the conspirators while the conspiracy was in progress, and in furtherance of the common design or purpose, is deemed to have been said, written, or done by every one of them, and is admissible in evidence against each; and this is true both in criminal and in civil cases. The principal on which the acts and declarations of other conspirators are admitted in evidence against the person prosecuted is that by the act of conspiring together the conspirators have jointly assumed to themselves, as a body, the attribute of individuality, so far as regards the prosecution of the common design, thus rendering whatever is done or said by any one of them, in furtherance of that design, a part of the res gestae, and therefore the

act or declaration of all. Again, it has been said that, under the well-settled rules pertaining to criminal conspiracies, each of the parties to such conspiracy becomes, under the law relating to accomplices, responsible for all of the declarations and acts of the others which are spoken or performed in the execution of the common purpose, and all such acts and statements are admissible as a part of the proof of the general plan.

* * * the general rule also applies to the declaration of a co-conspirator, even though he is not under prosecution, and it is not necessary that the conspirator whose declarations are about to be introduced should be jointly indicted with the accused."

and page 77:

"It is sufficient if the conspiracy is established by evidence which makes a prima facie case which fairly raises a presumption or inference of a conspiracy, and in this respect, much latitude is necessarily left to the trial court in determining whether or not there has been introduced sufficient prima facie proof of a conspiracy. A mere circumstance may be the basis for determining whether two people apparently bent upon the same purpose are both guilty, or one is guilty and the other innocent, and evidence of companionship with an accomplice at the time of the commission of the offense is a circumstance which will warrant an instruction relating to conspiracy.

* * * * *

However, the rule requiring at least prima facie proof of a conspiracy, before the admission of testimony of acts or declarations of persons associated with the accused in the conspiracy, is not without qualifications. If the evidence of declarations is first admitted, and it is afterwards made to appear from the whole case that a conspiracy existed, the mistake in admitting the evidence before proof of the conspiracy is immaterial and not prejudicial."

and Page 81:

"28. Generally. Of course, a conspiracy may be proved by the direct testimony of one of the conspirators. The fact that the witness testifying to the conspiracy is a co-conspirator goes to the weight, but not to the competency, of the witness or the evidence."

We also quote and emphasize the following pertinent parts of syllabi in the *Nevius* case, *supra*:

"7. Where in the trial of a prosecuting Attorney for accepting a bribe from gamblers a prima facie showing is made of a conspiracy between such gamblers and the prosecuting attorney whereby the gamblers were permitted to conduct gambling free from molestation by such prosecuting attorney, the statement of a co-conspirator in furtherance of the common design of such conspiracy, made in the absence of such prosecuting attorney, may be introduced in evidence.

8. It is not necessary that such conspiracy be one to commit the identical offense charged in the indictment, it being sufficient that the offense charged in the indictment be incidental to the conspiracy. (Goins v. State, 46 Ohio St. 457; State v. DeRighter, 145 Ohio St., 552, approved and followed.

9. Where on the trial of a prosecuting attorney for accepting a bribe to influence him with respect to his official duty, a prima facie case is made of conspiracy between certain gamblers and such prosecuting attorney to permit gambling in violation of law and without molestation by such prosecuting attorney, it is not error for the trial court to permit one who prepared the income tax returns of such gamblers jointly indicted with the prosecuting attorney, to testify as to the contents of such income tax returns. Such testimony tends to show the extent and profits of the gambling enterprise protected by the conspiracy and the incentive and ability of the gambling co-

> conspirators to pay for protection of their illegal enterprise. The large profits reaped through such conspiracy reflect as well upon the probability that bribery was an incident of such conspiracy."

With these principles in mind we find no prejudicial errors committed by the trial Court in his admission of evidence. This ruling applies to the testimony of Nigro, Carmola, Spies, and the gambling stamp tax returns of the three alleged co-conspirators and the tape recording of the conversation between Nigro and Carmola.

We are of the opinion that there was presented a prima facie case of conspiracy by the direct testimony of Nigro, one of the conspirators. His testimony was direct and not hearsay or circumstantial. Once the prima facie case was established, then all the acts of the co-conspirators and all the circumstances surrounding the transaction were admissible.

Allowing the said tape recording to go to the jury room has given this Court major concern. However, the record shows no specific objection by the defense. Probably the objection to its admission carries through, but assuming that it does, Section 2945.35 R. C. provides:

> "Upon retiring for deliberation, the jury, at the discretion of the court, may take with it all papers except depositions, and all articles, photographs, and maps which have been offered in evidence."

We hold that since the statute places the matter "at the discretion of the Court," no prejudicial error was committed thereby.

We find no violation of defendant's legal or constitutional rights.

After a careful review of all the evidence we affirm the judgment and sentence of the trial Court.

JOURNAL ENTRY OF THE COURT OF APPEALS OF TUSCARAWAS COUNTY, OHIO.

This cause came on for hearing on November 29th, 1960, upon the appeal of the Defendant-Appellant on questions of law, together with the original papers and pleadings, the record, the Bill of Exceptions and Exhibits from the Court of Common Pleas of Tuscarawas County; and said cause was argued by counsel.

Upon due consideration thereof, the Court finds there is no prejudicial error in this cause, no violation of the legal or Constitutional rights of the Defendant-Appellant, and that none of the Assignments of Error of the Defendant-Appellant are well taken and the same should be overruled.

Wherefore, it is ordered and adjudged that all of the Assignments of Error of the Defendant-Appellant are hereby overruled and the verdict, judgment and sentence of the Trial Court be, and the same is, hereby affirmed; this cause is remanded to the Trial Court for execution of the sentence thereof, and further proceedings required by law, if any; and the Defendant-Appellant, George Markos, is hereby ordered to pay the costs of these proceedings, taxed at $_____.

Exceptions allowed.

ORDER OF THE SUPREME COURT OF OHIO DISMISSING APPEAL AS OF RIGHT.

March 29, 1961.

Per Curiam.

The appeal as of right herein is dismissed for the reason that no debatable constitutional question is involved.

Appeal dismissed.

WEYGANDT, C. J., ZIMMERMAN, MATTHIAS, BELL and O'NEILL, concur.
HERBERT, J., not participating.

ORDER OF THE SUPREME COURT OF OHIO DENYING APPLICATION FOR REHEARING.

April 19, 1961.

Per Curiam.

Rehearing denied.

INDICTMENT (SEVEN COUNTS) IN THE COURT OF COMMON PLEAS, TUSCARAWAS COUNTY, OHIO.

Of the Term of January in the Year of Our Lord One Thousand Nine Hundred and Sixty.

FIRST COUNT:

The Jurors of the Grand Jury of the State of Ohio, within and for the body of the County aforesaid, on their oaths, in the name and by the authority of the State of Ohio, do find and present that George Markos on or about the 1st day of February, 1958, at the County of Tuscarawas aforesaid, did corruptly give to an officer, to-wit: Clifford C. Froelich, duly elected, qualified and acting Mayor of

the City of Dover, Ohio, after his election thereto, a valuable thing, to-wit: Money, to influence his action, opinion, or judgment in a matter that might legally come before him, contrary to and in violation of Section 2917.01 of the Revised Code of Ohio, and against the peace and dignity of the State of Ohio.

SECOND COUNT:

And the Jurors of the Grand Jury aforesaid, at the time and place aforesaid, on their said oaths, in the name and by the authority of the State of Ohio, do further find and present that said George Markos aforesaid, on or about the 27th day of June, 1958, at the County of Tuscarawas aforesaid, did corruptly give to an officer, to-wit: Clifford C. Froelich, duly elected, qualified and acting Mayor of the City of Dover, Ohio, after his election thereto, a valuable thing, to-wit: money, to influence his action, opinion, or judgment in a matter that might legally come before him, contrary to and in violation of Section 2917.01 of the Revised Code of Ohio, and against the peace and dignity of the State of Ohio.

THIRD COUNT:

And the Jurors of the Grand Jury aforesaid, at the time and place aforesaid, on their said oaths, in the name and by the authority of the State of Ohio, do further find and present that said George Markos aforesaid, on or about the 6th day of October, 1958, at the County of Tuscarawas aforesaid, did corruptly give to an officer, to-wit: Clifford C. Froelich, duly elected, qualified and acting Mayor of the City of Dover, Ohio, after his election thereto, a valuable thing, to-wit: money, to influence his action, opinion or judgment in a matter that might legally come before him, contrary to and in violation of Section 2917.01 of the

Revised Code of Ohio, and against the peace and dignity of the State of Ohio.

FOURTH COUNT:

And the Jurors of the Grand Jury aforesaid, at the time and place aforesaid, on their said oaths, in the name and by the authority of the State of Ohio, do further find and present that said George Markos aforesaid, on or about the 8th day of December, 1958, at the County of Tuscarawas aforesaid, did corruptly give to an officer, to-wit: Clifford C. Froelich, duly elected, qualified and acting Mayor of the City of Dover, Ohio, after his election thereto, a valuable thing, to-wit: money, to influence his action, opinion or judgment in a matter that might legally come before him, contrary to and in violation of Section 2917.01 of the Revised Code of Ohio, and against the peace and dignity of the State of Ohio.

FIFTH COUNT:

And the Jurors of the Grand Jury aforesaid, at the time and place aforesaid, on their said oaths, in the name and by the authority of the State of Ohio, do further find and present that said George Markos aforesaid, on or about the 24th day of March, 1959, at the County of Tuscarawas aforesaid, did corruptly give to an officer, to-wit: Clifford C. Froelich, duly elected, qualified and acting Mayor of the City of Dover, Ohio, after his election thereto, a valuable thing, to-wit: money, to influence his action, opinion or judgment in a matter that might legally come before him, contrary to and in violation of Section 2917.01 of the Revised Code of Ohio, and against the peace and dignity of the State of Ohio.

SIXTH COUNT:

And the Jurors of the Grand Jury aforesaid, at the time and place aforesaid, on their said oaths, in the name and by the authority of the State of Ohio, do further find and present that said George Markos aforesaid, on or about the 18th day of April, 1959, at the County of Tuscarawas aforesaid did corruptly give to an officer, to-wit: Clifford Froelich, duly elected, qualified and acting Mayor of the City of Dover, Ohio, after his election thereto, a valuable thing, to-wit: Money, to influence his action, opinion or judgment in a matter that might legally come before him, contrary to and in violation of Section 2917.01 of the Revised Code of Ohio, and against the peace and dignity of the State of Ohio.

SEVENTH COUNT:

And the Jurors of the Grand Jury aforesaid, at the time and place aforesaid, on their said oaths, in the name and by the authority of the State of Ohio, do further find and present that said George Markos aforesaid, on or about the 19th day of May, 1959, at the County of Tuscarawas aforesaid, did corruptly give to an officer, to-wit: Clifford Froelich, duly elected, qualified and acting Mayor of the City of Dover, Ohio, after his election thereto, a valuable thing, to-wit: money, to influence his action, opinion or judgment in a matter that might legally come before him, contrary to and in violation of Section 2917.01 of the Revised Code of Ohio, and against the peace and dignity of the State of Ohio.

JAMES S. PATRICK,

Prosecuting Attorney.

SUPREME COURT, U. S.

FILED

SEP 19 1961

JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1961.

No. 232.

GEORGE MARKOS,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

ANSWER BRIEF OF RESPONDENT

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QUESTIONS PRESENTED

1.

Whether, at a trial for bribery, a statement made to the assistant prosecuting attorney by the public official bribed, after the date of the last payment, but during the scheme or conspiracy, is competent, when made in furtherence of the conspiracy or scheme, deprives petitioner of right of confronting the witness against him, and violates thereby the Due Process Clause of the Fourteenth Amendment and Sixth Amendment of the Constitution of the United States, when the question of the Fourteenth Amendment was not raised in prior proceedings in this cause.

2.

Whether during a scheme or conspiracy to give bribes to a public official, in which steps were taken by the bribe givers and bribe taker to quiet one of the co-conspirators from exposing their bribes by the offer of money to him if competent evidence in a bribery trial with evidence of conspiracy, violates the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States, when the Federal Question was not raised in prior proceedings.

3.

Whether a taped conversation from a tape recorder used to refresh a witness' recollection, wherein the entire taped conversation was run before the jury but certain parts excluded and the jury instructed not to consider the excluded portions, but where the entire tape conversation recording was sent to the jury room, violates the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

4.

Whether the sentence imposed and probation qualifications violate the Fourteenth and Eighth Amendments of the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States

SIXTH AMENDMENT:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense."

EIGHTH AMENDMENT:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

FOURTEENTH AMENDMENT:

Section 1 — (Limited to) ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF CASE

I — IN GENERAL

In the latter part of 1957, George Markos, Frank Duda, Paul Knisely, Joseph Adelstein, Fred Bergquist, Nick Nigro, and at least two others, all of whom engaged in gambling activities in the City of Dover, Ohio, entered into a scheme or plan with Clifford Froelich, the mayor of said city, whereby each of the gamblers paid in a certain sum each month and from this George Markos gave money to Mayor Clifford Froelich, the purpose being to permit the gamblers to operate unmolested by law enforcement.

Said gambling activities, being illegal, include, but are not limited to, punch boards, numbers, horse bets, lottery tickets, tip boards, football and basketball and baseball parlays, and the like. With respect to the Petitioner Markos himself, he operated a warehouse in Dover, Ohio, from which he leased "bingo" type pinball machines, which were gambling devices, thirty-one of which were confiscated in a raid by the authorities upon said warehouse on February 10, 1960, together with other gambling paraphernalia. Said gambling devices according to the Defendant Markos all carried current Federal Gambling Stamps.

Said Mayor accepted sums of money from Markos on at least six separate occasions, which sums totalled $1500.00. As a result of this bribery, gambling did flourish in said city.

Nick Nigro was arrested twice during 1958 and the first half of 1959, each occasion being when he failed to meet his monthly payment, and he became disgruntled thereby. He demanded the return of his protection money from Mayor Froelich.

Thereafter, there ensued a series of conferences and meetings between the above mentioned co-conspirators, including Markos, the purpose of which were to make a settlement in cash with Nigro in an effort to conceal their bribe activities and to silence Nigro, and keep the plan in effect.

The said efforts failed when Nigro refused to accept several offers of money settlement, and went to the law

authorities and related to them this entire situation. After a thorough and complete investigation by said authorities, which corroborated the statements of Nick Nigro, the Grand Jury returned Indictments of Bribery against George Markos, Frank Duda, Paul Knisely, Joseph Adelstein, Fred Bergquist and Mayor Clifford C. Froelich under Section 2917.01 of Ohio Revised Code.

The defendant Markos was tried first among these co-conspirators and convicted by the Jury on Six Counts of Bribing said Mayor Clifford Froelich. During the trial one of the above mentioned pinball machines was admitted into the evidence.

Thereafter, the Hon. Judge Frank C. Cope sentenced Defendant Markos on two of said Counts and placed him on probation on the remaining four Counts, on such terms and conditions which the Court of Appeals said were "rather harsh" but also that the Trial Court had not abused its discretion thereby.

A motion for New Trial was filed and overruled thereafter.

Upon appeal thereof, the Fifth District Court of Appeals, unanimously affirmed the judgment and sentence of the Trial Court.

Upon appeal thereof, the Ohio Supreme Court dismissed the same for the reason that no debatable constitutional question is involved.

Thereafter, the Ohio Supreme Court denied an application for rehearing.

II — MATERIAL FACTS

(a) Evidence of Scheme or Conspiracy.

Nicholas Nigro, youthful witness for State of Ohio, testified he opened a gambling establishment in Dover, Ohio, in August, 1957. (R. 175) Through the petitioner Markos, he entered into a scheme with five other gamblers and an employee of petitioner, to pay the Mayor of Dover money to permit gambling, which is an unlawful enterprise. (R 180) All paid into a monthly fund handled by petitioner and distributed at least in part to the Mayor. (R. 190) Nigro and the others paid into this fund at least until June 1959.

Wagering tax returns and gambling tax applications were placed in evidence by the State for three of the gamblers, two sets of which extended through the year 1959. (R. 35 - 50) One of the petitioner's thirty-one pinball machines and other gambling devices obtained in a raid on February 10, 1960 pursuant to search warrant, were placed in evidence. (R. 170 - 172). All of the co-conspirators involved handled gambling devices of petitioner in their gambling enterprises.

On January 26, 1960, Mayor of Dover appeared in Prosecutor's office, at Prosecutor's request, and having been notified of his rights, admitted knowledge of existence of gambling in Dover; admitted his attendance at a meeting on January 6, 1960 with some of the co-conspirators to settle with Nigro; admitted payment of $500.00 to Nigro, and after first denial, admitted receiving in Dover six payments from George Markos totalling $1500.00, and would produce a record of them. (R. 346 - 348) (See Exhibit 141)

The State of Ohio had issued a subpoena for Mayor of Dover, who appeared at the Court House, but he filed a motion in this cause with his sworn affidavit attached stating his absolute refusal to testify as a witness for the State of Ohio on ground that it would tend to incriminate him. (See original file).

Petitioner Markos admitted he gave Mayor $380 "over a four year period." (R. 386).

Although he was available, Petitioner Markos did not subpoena or call Mayor as witness.

(b) Evidence of Cover Up During Scheme of Conspiracy.

After Nigro was put out of business by his arrests and payments (R. 191, 194 - 196, 203, 206, 213) he contacted the bribe taker, Mayor Froelich, to learn who set the price and see if he could have his payments returned. (R. 218). The Mayor and other bribe givers contacted him often to settle the matter. (R. 216, 219, 221, 225, 228, 234, 237, 229, 292) and he paid him $500 in bills secretly in the basement of City Hall. (R 222). He further threatened Nigro (R. 227). Carmola, aider and agent of bribe givers, (R. 234), offered Nigro $3500 (R. 236) and later $1300 (R. 296) on January 13, 1960.

On the night of January 13, 1960, Carmola made three visits to Nigro with offer of money and he was in direct contact and under advice and direction of petitioner Markos between visits. (R. 294 - 297, 305, 314).

(c)

A tape recording containing a conversation between one of the co-conspirators and an emissary of the other co-conspirators was introduced into evidence by the State of Ohio after the same had been properly identified as to operation of the recording device, method of operation, accuracy of the recording and identity of the persons speaking. (R. 282, - 287).

The tape recording was first played to the petitioner out of the presence of the Jury. (R. 290).

Thereafter, when the tape was played before the jury, the trial court ordered it stopped every few minutes, and sustained all objections of the petitioner to certain parts of the tape, being a total of five specific matters. The trial court described each matter with particularity and in each case instructed the Jury to disregard the same. (R. 294 - 300, 308, 309, 317, 325).

III — FEDERAL QUESTIONS RAISED BELOW

The only Federal Questions raised below are:

1. The Sixth Amendment of the Constitution of the United States with respect to Question 1 presented herein.

2. The Eighth Amendment and Fourteenth Amendments of the Constitution of the United States with respect to Question 4 presented herein.

In the brief filed by petitoner in the Court of Appeals for the Fifth Appellate District, Tuscarawas County, Ohio, and which is part of the record herein, petitioner raised the following constitutional questions:

1. Constitution of United States, Amendment Six, with respect to the right of accused to be confronted with the witness against him. (Page 27 of Brief).

2. Amendment Fourteen, Section 1 thereof, and particularly with respect to whether the probationary terms of the sentence was a deprivation of property without due process of law. (Page 10).

In the brief filed by petitioner in the Supreme Court of Ohio, Petitioner raised the following constitutional questions raised here also:

1. Amendment Five and Amendment Eight with respect to probationary sentence of petitioner — (Pages 18 and 20).

2. Amendment Six with respect to confrontation of witness (Page 21).

Other than the above, no United States Constitutional questions here were raised by petitioner at any time prior to the present petition.

ARGUMENT

Question 1.

Certiorari should not be granted in this case because petitioner was well accorded fundamental right to a fair hearing pursuant to the Constitution of the United States.

The crime charged here is bribery and proof involved conspiracy of petitioner and others with Mayor to suppress enforcement of gambling ordinances and law.

No question has ever been raised as to the Due Process Cause of the Fourteenth Amendment of the Constitution of the United States.

However, even if such question were raised, the Mayor was a co-conspirator, as an integral part of the scheme to allow gambling to flourish in Dover as its central aim. State of Ohio vs. Nevius 147 Ohio State 263.

This conspiracy was still in existence on January 26, 1960, since tax returns of gamblers through 1959 indicated, and raid upon petitioner's warehouse on February 10, 1960 showed his possession of gambling devices, and the Mayor knew of it.

Although the declaration of the act of receiving payment by the Mayor came after the date of last receipt thereof, it came during the continuation of the unlawful enterprise in furtherance of the common object; that is, the payment to Mayor by petitioner was essential to the common object of allowing gambling to flourish. State of Ohio vs. DeRighter 145 O.S. 552; 10 Ohio Jurisprudence (2d) 79; Krulevitch vs. United States 336, U.S. 440, 69 S. Ct. 716, 93 L. Ed. 760 (Although latter involved case based upon United States Code.) Therefore, such declaration of act was not extrajudicial.

Question 2.

First, this question was not raised as a Federal State Constitutional question in any prior proceedings in this cause, but merely as a legal evidentiary matter. Helvering v. Minn. Tea Company 296 U.S. 378; 56 S. Ct. 269.

Secondly, even had the question been properly raised prior hereto, the petitioner himself directly participated

in the proposed pay-off to Nigro with or without the conspiracy, and therefore this evidence is not heresay.

Thirdly, the conspiracy or scheme was still in being at the time pay off attempts were made to Nigro, and therefore statements of co-conspirators made during that time are admissible with respect to pay-offs as these are in furtherance of the conspiracy. State v. Nevius, 147 Ohio State 263. (Supreme Court).

Even had the conspiracy ended, prior to attempted pay offs of Nigro, Ohio has long ruled that subsequent acts of concealment are admissible against a co-conspirator as are acts and declarations made during the pendency of the unlawful enterprise and in furtherance of the common object. State v. DeRighter 145 Ohio State 558 (Supreme Court) Section 2945.59 of Ohio Revised Code.

Question 3.

First, the constitutional question concerning the tape recording has not been properly raised by petitioner prior to the filing of his petition for Writ of Certiorari.

The Supreme Court has repeatedly held that it will not consider a point first raised by Petition for Certiorari. (Helvering vs. Minnesota Tea Company 296 U.S. 378, 56 S. Ct. 269).

Secondly, even if raised properly, Tape recordings give independent support to testimony.

Tape recordings are admissible for the purpose of recollection.

Tape recordings are admissible as independent evidence of what occurred. (Monroe vs. United States 234 Fed. 2nd 49).

Section 2945.35 of the Ohio Revised Code provides: "Upon retiring for deliberation, the Jury, at the discretion of the Court, may take with it all papers except depositions, and all articles, photographs, and maps which have been offered into evidence."

An examination of the record as to the transcript of the tape will reveal that the matters, which the Court instructed the Jury to disregard, in no way would prejudice the petitioner in this cause, and the same is true had the Jury not been instructed to disregard the same.

Question 4.

The terms of the sentence do not constitute cruel and unusual punishment.

The penalty provided for violation of Section 2917.01 of the Revised Code of Ohio (The Bribery Statute) is as follows:

> "Whoever violates this section shall be imprisoned not less than one nor more than ten years."

> Section 2951.02 of the revised Code of Ohio provides: "Where the defendant has . . . . been found guilty and it appears to the satisfaction of the Judge or Magistrate that the character of the Defendant and the circumstances of the case are such that he is not likely again to engage in an offensive course of conduct, and the public good does not demand or require that he be immediately sentenced, such Judge or Magistrate may suspend the imposition of sentence and place the Defendant on probation upon such terms as such Judge or Magistrate determines . . . . "

Further in the case of State vs. Emonds 11 Ohio Law Abstract 410, the Court stated:

> "Probation is a form of correctional treatment, in which sense it is punishment fully as much as imprisonment; it is not leniency. To impress both the defendant and others with the seriousness of the offense, and is this sense to accomplish punishment as rigorous and effective is imprisonment the conditions of probation may exact pecuniary restitution and impose onerous restraints upon liberty."

The terms of this sentence are conditional and as such provide an election to petitioner, and do not deprive him of property without due process of law. As of this date, the petitioner voluntarily has partially complied with the terms of his probation.

Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel within the meaning of that word as used in the Constitution. It implies then something inhuman and barba-

rous, something more than the mere extinguishment of life. (Ex Parte Kemmler — 136 U.S. 436, 10 S. Ct. 930; Weems vs. United States 217 U.S. 349 — 30 S. Ct. 544).

CONCLUSION

Therefore, respondent State of Ohio does respectfully submit that the Constitutional Rights of the Petitioner have not been violated and that a Writ of Certiorari to the Supreme Court of the State of Ohio be denied.

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APPENDIX

OPINION OF THE COURT OF APPEALS OF TUSCARAWAS COUNTY, OHIO

(Decided Dec. 20, 1960.)

McLAUGHLIN, J.

This criminal appeal is from a bribery conviction and sentence. Defendant Markos was indicted in seven counts for giving money bribes to Mayor Froelich of Dover, the purpose being to permit a group of alleged gamblers to operate unmolested by local law enforcement officials.

The State filed a bill of particulars which stated that Markos "did plan, scheme and arrange in the nature of a conspiracy with the following named persons, to-wit: Fred G. Bergquist, Joseph Adelstein, Paul J. Knisely, Frank Duda and Nickolas Nigro of Dover, Ohio, and other persons unknown to the State of Ohio at this time, that whereby the said George Markos and Frank Duda did solicit, collect and accept money from the above named persons, and did arrange for payments of at least part of said monies to be paid by the Defendant or his agent, Frank Duda, to Clifford C. Froelich, the duly qualified, elected and acting Mayor of the City of Dover, Tuscarawas County, State of Ohio. Said payments were made to said Mayor on the dates indicated in each count of the Indictment, and were made for the purpose to influence said Mayor Froelich with respect to his official duty as Mayor of said City, to-wit: The non-enforcement of ordinances and laws relating to gambling activities of said above named persons in said City of Dover, and to influence his action, opinion or judgement in matters that might legally come before him, which matters may have involved said above named persons. The amount of money payments in each count of the Indictment cannot be stated definitely at this time, but the State does believe that said money payments were above as indicated below. First Count: Amount Unknown. That count has been eliminated. Second Count: $300.00. Third Count: $150.00. Fourth Count: $300.00. Fifth Count: $300.00. Sixth Count: $150.00. Seventh Count: $300.00. As to the place where the payment of money was made to May-

or Froelich, the State does not know with complete definiteness as to the exact location, but it believes that it was in or about the City of Dover, in the County of Tuscarawas."

Similar indictments were returned against the other persons named in the bill of particulars, except Nickolas Nigro, who was granted immunity to be a witness for the State. Mayor Froelich was indicted for taking the bribes.

Nigro, a disgruntled gambler, apparently told his story, first to some newspaper men, then to the Governor, who referred the matter to the Attorney General's Office, then to two special investigators for the Attorney General, then to the local Prosecuting Attorney, then to the Grand Jury and finally in Court as a State's witness.

His story, in substance, was that he was a member of a group of gamblers, including Markos, who in the latter part of 1957, were engaged in large scale gambling activities in Dover; that this group entered into a scheme or plan, whereby each of the gamblers paid a certain sum of money each month into a pool controlled by Markos, who in turn gave it to Mayor Froelich for "protection" or for being allowed to operate their gambling activities unmolested by the law; that he (Nigro) was arrested three times, each time being an occasion when he had failed to make his $75.00 monthly assessment; that he became disgruntled and went to Mayor Froelich and demanded his money back; that afterwards the gamblers met in a series of clandestine meetings, their purpose being to buy Nigro's silence concerning their gambling and bribery activities; that Nigro refused several offers of settlement; that on one occasion Mayor Froelich did return $500.00 to him.

Shortly after Nigro had "talked" to the authorities, a search warrant was obtained and Markos' warehouse was searched and a lot of gambling paraphernalia was seized. It consisted of punch boards, baseball tickets, football pool tickets, numbers slips, and bingo type pinball machines.

Also, some astute, alert detective work on the part of Attorney General's investigators procured from the Internal Revenue Department the tax returns of certain gamblers in the group who had obtained Federal gam-

bling stamps, which showed their yearly gambling income to run into hundreds of thousands of dollars.

Upon trial, the search and seizure of the gambling paraphernalia, certain of which was offered in evidence, was shown first. Then the tax returns of the Federal stamp holders were next offered. All this evidence was admitted tentatively by the trial Court, upon the Prosecutor's professional statement that it would be connected up later. Then the State called as a witness one Mike Carmola, who professed to be friendly to both Nigro and the group who were attempting to buy his silence. Carmola testified as to being sent as an emissary to Nigro's house, to negotiate a settlement with him. Since this was after Nigro had "talked" to the authorities, a tape recorder had been planted in Nigro's house and the entire conversation between Nigro and Carmola was recorded thereon. Upon Carmola's statement that he did not recall this conversation in detail, the trial Court then allowed the tape recorder to be played back to him in the presence of the Jury. Later the tape recorder was offered and admitted in evidence over objection. It was allowed to go to the Jury room, without specific objection thereto, as an exhibit. It should be stated that during the playing of the tape recorder, the trial Court stopped it a number of times, and struck from the Jury's consideration certain parts of the recording. As a final witness, the State offered the testimony of Spies, the Assistant Prosecutor, who related that he had had several conversations with Mayor Froelich, who had told him that Markos had at various times given him money for "city improvements" such as "new garbage cans," and that the Mayor had given him a list, which was offered and admitted in evidence, over objection, of times and amounts. The list showed that the Mayor had accepted from Markos, on at least six separate occasions, sums of money which totaled $1500.00.

The jury returned its verdict, finding Markos guilty as charged in the second, third, fourth, fifth and sixth counts of the indictment. The first count was dismissed by the trial Court.

Markos makes several assignments of error. They are herein treated in the same order as briefed.

I — Misconduct of juror during trial.

All that the record shows is that counsel made certain statements in argument upon a supplemental motion for new trial. It was claimed that there was an attempted bribery of a juror to favor the defense, and that the juror approached had not reported same to the Court, contrary to specific instructions, and that the alleged bribor was later indicted.

We note that none of the facts of this juror's alleged misconduct appear affirmatively in the record of this trial. It would be a travesty on justice for this Court to say that the attempted bribery of a juror in favor of the defense prejudiced the jury or prevented the accused from having a fair trial. See Section 2945.83 of the Revised Code, which holds in pertinent part:

> ". . . nor shall any judgment of conviction be reversed in any court . . . unless it appears affirmatively from the record that the accused was prejudiced thereby or was prevented from having a fair trial."

II — Misconduct of the Prosecuting Attorney

The defense brief has the following statement of facts, none of which are shown affirmatively by the record. On the morning the trial was to commence, while the prospective jurors were entering the Courthouse, a truck-van load of the pinball machines was backed up to the south stairs of the Courthouse facing the plaza. The rear and side doors were open and it is claimed that it was absolutely impossible for a prospective juror entering the south door to avoid seeing the pinball machines. It is further claimed that the Prosecutor had also caused more pinball machines to be placed in the lobby or corridors outside the Courtroom.

However, the record is void of any evidence of these facts or even any comment by counsel, or as to any juror having observed the machines or was prejudiced thereby. The record does show that one of the machines was offered and admitted into evidence. Therefore we fail to see how any juror could have ben prejudiced. Again we cite the above quoted words of Section 2945.83 R.C.

Misconduct of the Prosecutor is also claimed in that he released information contained in the gambling tax returns of the conspirators prior to them being submitted as evidence to the Jury. The record of trial shows that the gambling tax returns of Joseph Adelstein, Fred Bergquist and Paul Knisely were admitted in evidence. The record does not show that the Prosecutor released this information to the newspapers. Even if we assume that he did, we cannot see how it could have prejudiced the accused since the tax returns were in evidence. The Prosecutor is not responsible for the conduct of vigorous and alert news reporters. We see no misconduct. See again Section 2945.83 R.C.

III — Error in the Sentence.

The trial Court after sentencing Markos to the Penitentiary on the second and third counts, suspended the imposition of sentence on the fourth, fifth, sixth and seventh counts and imposed rather harsh terms and conditions. These terms required Markos generally to dispose of all of his coin operated machines and to reimburse the State for expenses incurred in the investigation and prosecution of this case.

Section 2951.02 R.C. provides in pertinent part that the "Judge . . . may suspend the imposition of sentence and place the defendant on probation upon such terms as such Judge determines . . ."

Conditions of probation are discretionary with the trial Judge and their acceptance is optional with the defendant. Although the conditions imposed here extract pecuniary restitution to the State and do impose onerous restraints upon his liberty and property rights, we cannot say that the trial Court abused its discretion in the sentence of the accused George Markos.

IV — Irregularities in the proceedings of the Court; Errors of law at trial; violation of defendant's legal and constitutional rights.

(A) Alibi. The trial Court rejected defendant's proferred evidence of alibi. No notice of intention to prove an alibi was given as required by statute. Defendant claims that the indictment and bill of particulars

lacked sufficient definiteness of dates when the bribe money was paid. Each of the last six counts of the indictment stated that the payments were made on or about certain definite dates. The defendant proferred evidence of his whereabouts elsewhere on the exact dates as set forth in two counts of the indictment and bill of particulars. This indicates that he entertained no uncertainty of those dates and completely dispels his excuse for not giving the State notice of intention to prove alibi.

(B) Error in the admission of evidence offered by the State over objection of the defendant. Obviously the trial Judge, in ruling upon the admission of certain items of evidence, was attempting to follow a line of Ohio authorities, especially the landmark case on conspiracy, State vs. Nevius, 147 Ohio State, 263. The Ohio rule is well stated in various paragraph sections of Ohio Jurisprudence 2nd, several of which we quote: 10 Ohio Jurisprudence 2nd, Pages 75 and 76:

> "24. Generally. It is well established in Ohio that when the fact of a conspiracy has been established prima facie, everything said, written, or done by any one of the conspirators while the conspiracy was in progress, and in furtherance of the common design or purpose, is deemed to have been said, written, or done by every one of them, and is admissible in evidence against each; and this is true both in criminal and in civil cases. The principal on which the acts and declarations of other conspirators are admitted in evidence against the person prosecuted is that by the act of conspiring together the conspirators have jointly assumed to themselves, as a body, the attribute of individuality, so far as regards the prosecution of the common design, thus rendering whatever is done or said by any one of them, in furtherance of that design, a part of the res gestae, and therefore the act or declaration of all. Again it has been said that, under the well-settled rules pertaining to criminal conspiracies, each of the parties to such conspiracy becomes, under the law relating to accomplices, responsible for all of the declarations and acts of the others which are spoken or performed in the execution of the common purpose, and all such acts and

statements are admissible as a part of the proof of the general plan.

* * * the general rule also applies to the declaration of a co-conspirator, even though he is not under prosecution, and it is not necessary that the conspirator whose declarations are about to be introduced should be jointly indicted with the accused."

and Page 77:

"It is sufficient if the conspiracy is established by evidence which makes a prima facie case which fairly raises a presumption or inference of a conspiracy, and in this respect, much latitude is necessarily left to the trial court in determining whether or not there has been introduced sufficient prima facie proof of a conspiracy. A mere circumstance may be the basis for determining whether two people apparently bent upon the same purpose are both guilty, or one is guilty and the other innocent, and evidence of companionship with an accomplice at the time of the commission of the offense is a circumstance which will warrant an instruction relating to conspiracy.

* * *

However, the rule requiring at least prima facie proof of a conspiracy, before the admission of testimony of acts or declarations of persons associated with the accused in the conspiracy, is not without qualifications. If the evidence of declarations is first admitted, and it is afterwards made to appear from the whole case that a conspiracy existed, the mistake in admitting evidence before proof of the conspiracy is immaterial and not prejudicial."

and Page 81:

"28. Generally. Of course, a conspiracy may be proved by the direct testimony of one of the conspirators. The fact that the witness testifying to the conspiracy is a co-conspirator goes to the weight, but not to the competency, of the witness or the evidence."

We also quote and emphasize the following pertinent parts of syllabi in the Nevius case, supra:

"7. Where in the trial of a prosecuting Attorney for accepting a bribe from gamblers a prima facie showing is made of a conspiracy between such gam-

blers and the prosecuting attorney whereby the gamblers were permitted to conduct gambling free from molestation by such prosecuting attorney, the statement of a co-conspirator in furtherance of the common design of such conspiracy, made in the absence of such prosecuting attorney, may be introduced in evidence.

8. It is not necessary that such conspiracy be one to commit the identical offense charged in the indictment, it being sufficient that the offense charged in the indictment be incidental to the conspiracy. (Goins v. State, 46 Ohio St. 457; State v. DeRighter, 145 Ohio St. 5,52, approved and followed.

9. Where on the trial of a prosecuting attorney for accepting a bribe to influence him with respect to his official duty, a prima facie case is made of conspiracy between certain gamblers and such prosecuting attorney to permit gambling in violation of law and without molestation by such prosecuting attorney, it is not error for the trial court to permit one who prepared the income tax returns of such gamblers jointly indicted with the prosecuting attorney, to testify as to the contents of such income tax returns. Such testimony tends to show the extent and profits of the gambling enterprise protected by the conspiracy and the incentive and ability of the gambling co-conspirators to pay for protection of their illegal enterprise. The large profits reaped through such conspiracy reflect as well upon the probability that bribery was an incident of such conspiracy."

With these principals in mind we find no prejudicial errors committed by the trial Court in his admission of evidence. This ruling applies to the testimony of Nigro, Carmola, Spies, and the gambling stamp tax returns of the three alleged co-conspirators and the tape recording of the conversation between Nigro and Carmola.

We are of the opinion that there was presented a prima facie case of conspiracy by the direct testimony of Nigro, one of the conspirators. His testimony was direct and not hearsay or circumstantial. Once the prima facie

case was established, then all the acts of the co-conspirators and all the circumstances surrounding the transaction were admissible.

Allowing the said tape recording to go to the jury room has given this Court major concern. However, the record shows no specific objection by the defense. Probably the objection to its admission carries through, but assuming that it does, Section 2945.35 R.C. provides:

> "Upon retiring for deliberation, the jury, at the discretion of the court, may take with it all papers except depositions, and all articles, photographs, and maps which have been offered in evidence."

We hold that since the statute places the matter "at the discretion of the Court", no prejudicial error was committed thereby.

We find no violation of defendant's legal or constitutional rights.

After a careful review of all the evidence we affirm the judgment and sentence of the trial Court.

JOURNAL ENTRY OF THE COURT OF APPEALS OF TUSCARAWAS COUNTY, OHIO.

This cause came on for hearing on November 29th, 1960, upon the appeal of the Defendant-Appellant on questions of law, together with the original papers and pleadings, the record, the Bill of Exceptions and Exhibits from the Court of Common Pleas of Tuscarawas County; and said cause was argued by counsel.

Upon due consideration thereof, the Court finds there is no prejudicial error in this cause, no violation of the legal or Constitutional rights of the Defendant-Appellant, and that none of the Assignments of Error of the Defendant-Appellant are well taken and the same should be overruled.

Wherefore, it is ordered and adjudged that all of the Assignments of Error of the Defendant-Appellant, and hereby overruled and the verdict, judgment and sentence of the Trial Court be, and the same is, hereby affirmed; this cause is remanded to the Trial Court for execution of the sentence thereof, and further proceedings required by law, if any; and the Defendant-Appellant, George Markos, is hereby ordered to pay the costs of these proceedings taxed at $.....

Exceptions allowed.

ORDER OF THE SUPREME COURT OF OHIO DISMISSING APPEAL AS OF RIGHT.

March 29, 1961.

Per Curiam.

The appeal as of right herein is dismissed for the reason that no debatable constitutional question is involved.

Appeal dismissed.

WEYGANDT, C. J., ZIMMERMAN, MATTHIAS, BELL and O'NEIL, concur.
HERBERT, J., not participating.

ORDER OF THE SUPREME COURT OF OHIO DENYING APPLICATION FOR REHEARING.

April 19, 1961.

Per Curiam.

Rehearing denied.

INDICTMENT (SEVEN COUNTS) IN THE COURT OF COMMON PLEAS, TUSCARAWAS COUNTY, OHIO.

Of the Term of January in the Year of Our Lord One Thousand Nine Hundred and Sixty.

FIRST COUNT:

The Jurors of the Grand Jury of the State of Ohio, within and for the body of the County aforesaid, on their oaths, in the name and by the authority of the State of Ohio, do find and present that George Markos on or about the 1st day of February, 1958, at the County of Tuscarawas aforesaid, did corruptly give to an officer, to-wit: Clifford C. Froelich, duly elected, qualified and acting Mayor of the City of Dover, Ohio, after his election thereto, a valuable thing, to-wit: Money, to influence his action, opinion, or judgment in a matter that might legally come before him, contrary to and in violation of Section 2917.01 of the Revised Code of Ohio, and against the peace and dignity of the State of Ohio.

SECOND COUNT:

And the Jurors of the Grand Jury aforesaid, at the time and place aforesaid, on their said oaths, in the name and by the authority of the State of Ohio, do further find and present that said George Markos aforesaid, on or about the 27th day of June, 1958, at the County of Tuscarawas aforesaid, did corruptly give to an officer, to-wit: Clifford C. Froelich, duly elected, qualified and acting Mayor of the City of Dover, Ohio, after his election thereto, a valuable thing, to-wit: money, to influence his action, opinion, or judgment in a matter that might legally come before him, contrary to and in violation of Section 2917.01 of the Revised Code of Ohio, and against the peace and dignity of the State of Ohio.

THIRD COUNT:

And the Jurors of the Grand Jury aforesaid, at the time and place aforesaid, on their said oaths, in the name and by the authority of the State of Ohio, do further find and present that said George Markos aforesaid, on or

about the 6th day of October, 1958, at the County of Tuscarawas aforesaid, did corruptly give to an officer, to-wit: Clifford C. Froelich, duly elected, qualified and acting Mayor of the City of Dover, Ohio, after his election thereto, a valuable thing, to-wit: money, to influence his action, opinion or judgment in a matter that might legally come before him, contrary to and in violation of Section 2917.01 of the Revised Code of Ohio, and against the peace and dignity of the State of Ohio.

FOURTH COUNT:

And the Jurors of the Grand Jury aforesaid, at the time and place aforesaid, on their said oaths, in the name and by the authority of the State of Ohio, do further find and present that said George Markos aforesaid, on or about the 8th day of December, 1958, at the County of Tuscarawas aforesaid, did corruptly give to an officer, to-wit: Clifford C. Froelich, duly elected, qualified and acting Mayor of the City of Dover, Ohio, after his election thereto, a valuable thing, to-wit: money, to influence his action, opinion or judgment in a matter that might legally come before him, contrary to and in violation of Section 2917.01 of the Revised Code of Ohio, and against the peace and dignity of the State of Ohio.

FIFTH COUNT:

And the Jurors of the Grand Jury aforesaid, at the time and place aforesaid, on their said oaths, in the name and by the authority of the State of Ohio, do further find and present that said George Markos aforesaid, on or about the 24th day of March, 1959, at the County of Tuscarawas aforesaid, did corruptly give to an officer, to-wit: Clifford C. Froelich, duly elected, qualified and acting Mayor of the City of Dover, Ohio, after his election thereto, a valuable thing, to-wit: money, to influence his action, opinion or judgment in a matter that might legally come before him, contrary to and in violation of Section 2917.01 of the Revised Code of Ohio, and against the peace and dignity of the State of Ohio.

SIXTH COUNT:

And the Jurors of the Grand Jury aforesaid, at the time and place aforesaid, on their said oaths, in the name and by the authority of the State of Ohio, do further find and present that said George Markos aforesaid, on or about the 18th day of April, 1959, at the County of Tuscarawas aforesaid did corruptly give to an officer, to-wit: Clifford Froelich, duly elected, qualified and acting Mayor of the City of Dover, Ohio, after his election thereto, a valuable thing, to-wit: Money, to influence his action, opinion or judgment in a matter that might legally come before him, contrary to and in violation of Section 2917.01 of the Revised Code of Ohio, and against the peace and dignity of the State of Ohio.

SEVENTH COUNT:

And the Jurors of the Grand Jury aforesaid, at the time and place aforesaid, on their said oaths, in the name and by the authority of the State of Ohio, do further find and present that said George Markos aforesaid, on or about the 19th day of May, 1959, at the County of Tuscarawas aforesaid, did corruptly give to an officer, to-wit: Clifford Froelich, duly elected, qualified and acting Mayor of the City of Dover, Ohio, after his election thereto, a valuable thing, to-wit: money, to influence his action, opinion or judgment in a matter that might legally come before him, contrary to and in violation of Section 2917.01 of the Revised Code of Ohio, and against the peace and dignity of the State of Ohio.

JAMES S. PATRICK,
Prosecuting Attorney.